Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-420

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD LANG, PETITIONER

v.

UNITED STATES OF AMERICA AND
REVENUE OFFICER ELIZABETH C. CAMP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bellis v. *United States*, 417 U.S. 85 2

Fisher v. *United States*, 425 U.S. 391 3

Grand Jury Empanelled 3-23-83, In re, 773 F.2d 45 3

Grand Jury Matter (Brown), In re, 768 F.2d 525 ..... 2, 3

Grand Jury Proceedings (Morganstern), In re, 771 F.2d 143, cert. denied, No. 85-658 (Dec. 16, 1985) 2

Grand Jury Proceedings (Vargas), In re, 727 F.2d 941, cert. denied, 469 U.S. 819 2

Grand Jury Subpoena, In re, 784 F.2d 857, cert. granted *sub nom.* See v. *United States*, No. 85-1987 (Oct. 6, 1986) 2, 3

Grand Jury Subpoena Duces Tecum (Ackerman) In re, 795 F.2d 904 2

Grand Jury Subpoena (Lincoln), In re, 767 F.2d 1130 2

Grand Jury Subpoenas Issued to Thirteen Corporations, In re, 775 F.2d 43, cert denied, No. 85-1051 (Mar. 24, 1986) 2-3

Two Grand Jury Subpoenae Duces Tecum, In re, 769 F.2d 52 2

United States v. *Doe*, 465 U.S. 605 ..... 2, 4

United States v. *Malis*, 737 F.2d 1511 2

Page

Constitution:

U.S. Const. Amend. V 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-420

RICHARD LANG, PETITIONER

v.

UNITED STATES OF AMERICA AND
REVENUE OFFICER ELIZABETH C. CAMP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that he may resist an Internal Revenue Service summons for corporate records on the ground that the act of producing them would incriminate him.

1. Petitioner owned 50% of the stock of KAL, Inc., a corporation. Respondent Camp, a revenue agent, was conducting an investigation to determine petitioner's and the corporation's correct federal income tax liabilities. Petitioner was served with an Internal Revenue Service summons addressed to him as "President, KAL, Inc.," requiring him to produce, for inspection by the IRS, corporate records that respondent Camp had already partially examined. In the summons enforcement proceeding, petitioner's argument that his act of production would incriminate him

was unsuccessful. The court of appeals affirmed the order enforcing the summons (Pet. App. 1-18).[1]

In affirming the enforcement order, the court of appeals noted that this Court, in a long line of decisions including *Bellis* v. *United States*, 417 U.S. 85 (1974), has held that the books and records of a collective entity such as a corporation or partnership cannot be insulated from production by a claim of privilege on the part of their custodian (Pet. App. 7a-9a). The court of appeals also observed that this Court, in *United States* v. *Doe*, 465 U.S. 605 (1984), recognized for sole proprietors a Fifth Amendment privilege against compelled self-incrimination through the testimonial act of producing the records of the business, and that the circuits have split over whether the privilege recognized in *Doe* extends to the custodian of corporate records (Pet. App. 9a-10a).[2] The court of appeals rejected the majority view that an individual may never invoke the privilege as a basis for failure to produce corporate documents held in a representative capacity. It agreed instead with the Second Circuit (*In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (1985); *In re Grand Jury Subpoenas Issued to Thirteen*

---

[1]The court also affirmed the lower court's order directing petitioner to respond to a summons issued to him personally for the production of his checking and brokerage account records. Petitioner does not challenge that ruling in his petition. We have been advised that petitioner has complied with that summons, and thus the order enforcing it is now moot.

[2]Compare *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *United States* v. *Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (en banc), cert. denied, No. 85-658 (Dec. 16, 1985); *In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir. 1986), cert. granted *sub nom. See* v. *United States*, No. 85-1987 (Oct. 6, 1986); and *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986), with *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc).

Corporations, 775 F.2d 43, 46 (1985), cert. denied, No. 85-1051 (Mar. 24, 1986)) that an individual may invoke the privilege when the subpoena directs him personally to produce the documents and the act of production would be self-incriminatory (Pet. App. 12a). The court then affirmed the district court's factual determination that petitioner's act of producing the corporate records would not rise to the level of testimonial self-incrimination (*id.* at 14a-16a).

2. Petitioner contends that the summons at issue here should have been quashed because the act of producing the requested documents would incriminate him. He seeks certiorari to resolve the conflict that exists in the circuits regarding the scope of a corporate officer's privilege vis-a-vis corporate records. This case, however, does not present that conflict, which presumably will be resolved in *See* v. *United States, supra*. Petitioner received the benefit of the most favorable rule that any circuit has applied to privilege claims by individuals holding corporate documents in a representative capacity, *i.e.*, that he could invoke the privilege if he could show that the act of production would be self-incriminatory.[3] The courts below rejected his showing. Instead, they found that petitioner's act of producing the corporate records would not rise to the level of testimonial self-incrimination, because the existence and location of the records were a "foregone conclusion" (*Fisher* v. *United States*, 425 U.S. 391, 411 (1976); Pet. App. 14a-15a), and

---

[3]The court of appeals did not adopt the position suggested in dictum by the Third Circuit in *In re Grand Jury Matter (Brown), supra*, and *In re Grand Jury Empanelled 3-23-83*, 773 F.2d 45 (1985), that the custodian of corporate records may invoke the privilege whether or not the subpoena is directed to him personally (see Pet. App. 10a-11a). Because the subpoena in this case was directed to petitioner personally, however, he was given the same right as the subpoenaed individuals in the two Third Circuit cases: an "opportunity to establish that production and authentication would tend to incriminate him" (*Brown*, 768 F.2d at 529; see *Grand Jury Empanelled 3-23-83*, 773 F.2d at 47).

because the records could be authenticated by persons other than petitioner (Pet. App. 16a).

The factual findings below are based on the particular circumstances of this case and therefore do not warrant review by this Court. Even if review were granted, *Doe* indicates that this Court would accept the lower courts' determination that the act of production would or would not be self-incriminatory, "unless it has no support in the record" (465 U.S. at 614). Because the court of appeals resolved the central legal issue in petitioner's favor and based its ultimate rejection of his privilege claim on factual findings peculiar to this case, the result would be the same, no matter what the ultimate outcome of *See*. There is therefore no need for the Court to hold this petition pending the decision in *See*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

DOJ-1986-10